UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL BRIGHT-ASANTE, Plaintiff, -against- SAKS & COMPANY, INC. d/b/a SAKS FIFTH AVENUE, THEO CHRIST LOCAL 1102 RWDSU UFCW Defendants.	Case No. 1:15-cv-5876 (ER)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AND/OR COMPEL ARBITRATION

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This memorandum of law is submitted on behalf of defendants Saks & Company LLC, d/b/a Saks Fifth Avenue ("Saks") and Theo Christ ("Christ"), (together, the "Saks defendants") in support of defendants' Motion To Dismiss and/or Compel Arbitration.

PRELIMINARY STATEMENT

This lawsuit arises out of the 2015 suspension of plaintiff Michael Bright-Asante, a Women's Shoe Department Sales Associate who worked at the Saks Fifth Avenue flagship store in Manhattan. At all times during his employment with Saks, plaintiff was a member of the Retail, Hotel and Department Store Union/United Food and Commercial Workers International ("RWDSU") Local 1102.

Plaintiff alleges four separate causes of action against Saks and one against Theo Christ, Vice President of Human Resources. The Saks defendants seek to dismiss all of the claims against them because they arise out of and relate to the collective bargaining agreement ("CBA") between Saks and RWDSU Local 1102 and, therefore, must be submitted to arbitration. Simply stated, every one of the claims relates to and challenges the propriety of plaintiff's suspension, which falls squarely within the Management Rights clause of the CBA, which provides:

> nothing in this Agreement shall be deemed to limit the Employer in any way in the exercise of all the functions of management, including but not limited to, the right to hire, suspend, discharge for just cause its salespeople, and the making and enforcement of policies relating to its operations, its facilities and to employee conduct."

That same CBA contains a grievance and arbitration provision governing any dispute or complaint arising between the parties under, or out of, the CBA, including the interpretation, application, performance, or any alleged breach thereof. Since plaintiff is specifically alleging breach of the CBA and challenging the validity of his suspension, plaintiff's claims against the Saks defendants must be submitted to binding arbitration, not to this Court.

There are also independent grounds for dismissal on the merits of plaintiff's New York Labor Law and constructive discharge claims.

PROCEDURAL BACKGROUND

I. This Lawsuit

Plaintiff filed his original Complaint on July 28, 2015. Certification of Wendy Johnson Lario ("Lario Cert."), Exhibit A. On September 28, 2015, the Court entered an Order of Automatic Referral to Mediation, and on October 15, 2015, a notice of assignment of mediator was issued. ECF Docket # 16. The Saks defendants filed an Answer to the Complaint on October 14, 2015. Lario Cert., Exhibit B. On January 8, 2016, a court-ordered mediation session was held, the parties did not reach a resolution. By letter dated February 9, 2016, plaintiff requested a pre-motion conference seeking leave to amend the Complaint. Lario Cert., Exhibit C (ECF Docket # 20). The pre-motion conference was held on April 1, 2016, and plaintiff was granted leave to amend.

Plaintiff filed his Amended Complaint on April 4, 2016. Lario Cert., Exhibit E (ECF Docket # 25). In it, plaintiff claims the Saks defendants violated the CBA when they suspended him without pay and failed to reinstate him after the government dismissed its criminal charges against him. Twenty-seven of the 33 "Factual Allegations" in the Amended Complaint expressly mention plaintiff's suspension, the CBA, or the grievance process. *Id.*

The four causes of action against Saks are based on these alleged CBA violations. They are: (1) unlawful race discrimination in "the making and enforcement of a contract" in violation of 42 U.S.C. §1981 (First Count) (also as against Theo Christ); (2) breach of the Management Rights provision of the CBA (Second Count); (3) retaliation based on Saks' opposition to plaintiff's application for unemployment benefits in violation of New York Labor Law §§ 215 and 596 (Fifth Count); and (4) constructive discharge based on Saks' suspension of plaintiff without pay (Sixth Count).[1] *Id.* While plaintiff only added one "new" cause of action against Saks, alleging constructive discharge, there are numerous additions and changes to the Factual Allegations and every Count of the Amended Complaint as compared to the initial Complaint. Lario Cert., Exhibit F (comparison of Complaint and the Amended Complaint).

There has been virtually no discovery in this action. As plaintiff explained in his February 9, 2016 letter to this Court: "No discovery has yet been done except for the limited discovery required by the Discovery Protocols in the Southern District. No prejudice will result to the defendants as a result of the amendment; they have not even spent any time or money in discovery." See Lario Cert., Exhibit C. Plaintiff's letter further stated that plaintiff's counsel purposefully waited until after the mediation concluded -- five and a half months after the initial Complaint was filed -- to seek leave to amend the Complaint. RWDSU Local 1102 concurred that no discovery had taken place, stating: "As Plaintiff notes, there has yet to be any discovery in this case except for the exchange of documents pursuant to the SDNY's initial discovery protocols in employment discrimination cases." See Lario Cert., Exhibit D. To date, the Saks defendants have served their responses to plaintiff's written discovery requests, and plaintiff has served his very limited responses to Saks' discovery requests. No depositions have been taken or scheduled. Lario Cert., ¶ 11.

Three weeks after plaintiff filed his Amended Complaint, on April 28, 2016, this Court So Ordered a substitution of counsel for the Saks defendants. ECF Docket # 26. On April 29, 2016, the Saks defendants requested a pre-motion conference seeking leave to file a motion to dismiss the Amended Complaint as to them. Lario Cert., Exhibit G (ECF Docket # 28). On May

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[1] The Third and Fourth Counts of the Amended Complaint are directed solely against RWDSU Local 1102.

19, 2016, a pre-motion conference was held, and the Saks defendants were granted leave to file the instant motion.

II. Grievance And Arbitration

As is admitted in the Amended Complaint, plaintiff did not file a grievance or demand arbitration related to his suspension. Instead, he requested that RWDSU Local 1102 do so on his behalf. Lario Cert., Exhibit E, ¶ 17. Plaintiff was told by RWDSU Local 1102 that it did file a grievance on his behalf. *Id.* at ¶ 24. Plaintiff also knew that, on August 21, 2015, RWDSU Local 1102 submitted plaintiff's grievance to arbitration. *Id.* at ¶ 41. Arbitration is currently scheduled to take place on June 23, 2016.

RELEVANT CBA PROVISIONS

The Management Rights provision in Article 2 of the CBA states:

> **ARTICLE 2. MANAGEMENT RIGHTS** It is agreed that the Employer possesses and retains exclusively to itself, except to the extent that they are specifically relinquished or modified by an express provision of this Agreement, all statutory and inherent management rights, powers, privileges or authority. Further, nothing in this Agreement shall be deemed to limit the Employer in any way in the exercise of all the functions of management, including but not limited to, the right to hire, suspend, discharge for just cause its salespeople, and the making and enforcement of policies relating to its operations, its facilities and to employee conduct.

Lario Cert., Exhibit H.

Article 21 details the step-by-step procedure required for addressing any complaints, grievances or disputes arising under the CBA. If the grievance cannot be resolved, the dispute "shall be referred to arbitration". *Id.* at Art. 21B. Article 21 of the CBA provides:

> **ARTICLE 21. ADMINISTRATION, GRIEVANCE & ARBITRATION PROCEDURE**
>
> **B. Adjustment of Grievances** The parties shall make earnest efforts to adjust any complaints, grievances or disputes arising under this Agreement or

any breach thereof, before the dispute shall be referred for arbitration. Either party may submit a Grievance and submit a Grievance for Arbitration. A "Grievance" shall be defined as a dispute or complaint arising between the parties hereto under or out of this Agreement or the interpretation, application, performance, or any alleged breach thereof, and shall be processed and disposed of in the following manner:

(1) **Step 1.** Within twenty (20) calendar days of an Employee having a Grievance, the Employee and/or his Shop Steward or Union Representative shall submit the Grievance in writing to the Employer. Any such Grievance, which shall be signed by the grievant and the Shop Steward or Union Representative, shall contain a written summary of the complaint and/or the contract provision alleged to have been violated and the remedy sought. Any Grievance shall be submitted at Step 1 to the Assistant General Merchandise Manager ("AGMM") responsible for Department 824 or such other person as the Employer may designate. The AGMM or the Employer's alternate designee shall give his/her answer to the Employee and/or the Shop Steward or Union Representative within twenty (20) calendar days or as soon as thereafter as practicable after the presentation of the Grievance at Step 1.

(2) **Step 2.** If the Grievance is not settled at Step 1, the Grievance may, within twenty (20) calendar days after the answer at Step 1, be presented at Step 2, in writing to the Vice President, Human Resources of the Employer's New York Store. A Grievance so presented in Step 2 shall be answered by the Employer in writing within twenty (20) calendar days or as soon thereafter as practicable after its presentation.

(3) **Step 3.** If the Grievance is not settled at Step 2 the Union may within twenty (20) calendar days from receipt of the Employer's answer at Step 2 submit the matter to arbitration as hereinafter provided. The demand for arbitration shall include a written description of the contract provision alleged to have been violated and the remedy sought. Notwithstanding any other provision of this Agreement, only those complaints, grievances or disputes that arise under or out of this Agreement or the application, performance or any alleged breach thereof shall be arbitrable.

(4) It is agreed that the Employer shall also have the right to submit disputes to arbitration.

(5) A copy of any request for arbitration shall be provided to the other party at the same time that it is submitted to the AAA.

(6) Any disposition of a Grievance from which no appeal is taken within the time limits specified herein shall be deemed resolved and shall not thereafter be considered subject to the grievance provisions of this Agreement.

> **C. Arbitration** A Grievance submitted for arbitration shall be submitted for resolution before an arbitrator to be selected by the parties in accordance with the Labor Arbitration Rules of the American Arbitration Association (AAA). The arbitrator's award and any opinion rendered in connection therewith shall be limited to the issues presented to him/her for decision. In any arbitration, the arbitrator shall be bound by the terms of this Agreement and shall have no authority to add to, subtract from, change or modify any provision of this Agreement. Both parties agree that the decision of the arbitrator shall be final and binding on the Union, the Employee or Employees involved and the Employer. When any award of backpay is made, there shall be deducted therefrom all earnings of the Employee or Employees involved, derived from sources other than the Employer during the period commencing with the Employee's date of discharge or suspension and ending with the date of reinstatement or the conclusion of the suspension. Provided secondary earnings during any backpay period that are based upon outside employment that the salesperson was engaged in as of the date of the suspension or discharge shall not be a set off other than to the extent the salesperson increased his or her secondary employment following the suspension or discharge. The arbitrator shall not have the authority to award punitive damages to any party. The findings, decisions and awards of the arbitrator shall be enforceable by proper action in any court of competent jurisdiction. The compensation, cost and expenses payable to the arbitrator shall be shared equally by the Union and the Employer. Each party shall bear its own attorney's fees and other expenses.

The CBA also prohibits discrimination of any kind in the workplace. *Id.* at Art. 25.

> **ARTICLE 25. NON-DISCRIMINATION** There shall be no discrimination against any employee on account of Union activities, gender, sexual orientation, disability, race, age, color or creed or national origin, or other legally protected status.

LEGAL ARGUMENT

I. Plaintiff's Claims Of Retaliation And Constructive Discharge Must Be Dismissed As A Matter of Law

A. Legal Standards

Federal Rule of Civil Procedure 12(b)(6) requires the Court to accept all of plaintiff's factual allegations as true and draw all reasonable inferences in his favor. However, the Court is not required to accept or credit mere conclusory allegations or "threadbare recitals of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *In re PetroChina Co. Ltd. Sec. Litig.*, 120 F. Supp.

3d 340, 353 (S.D.N.Y. 2015), quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plaintiff must allege sufficient facts to show "more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678 (citing *Twombly*, 550 U.S. at 570).

Here, plaintiff has failed to sufficiently plead the elements of the Fifth and Sixth Counts of his Amended Complaint, alleging violations of the New York Labor Law §§ 215, 596, and constructive discharge, respectively. Accordingly, these claims must be dismissed as a matter of law.

Alternatively, should this Court treat the instant motion as one seeking summary judgment, plaintiff's claims cannot survive dismissal under that standard either. Summary judgment is appropriate when the movant establishes that "there is no genuine issue as to any material fact and that [it] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An issue of fact is genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party" on that issue, and a fact is material only if its determination "might affect the outcome of the suit under governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Once the movant has established the absence of a genuine issue of material fact, "its opponent must do more than simply show that there is some metaphysical doubt as to material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Summary judgment should be granted if no reasonable trier of fact could find for the non-movant. *Anderson*, 477 U.S. at 249. Here, there are no genuine issues of material fact that would preclude summary judgment, and the Saks defendants must prevail as a matter of law as to their arguments on the Fifth and Sixth Counts of the Amended Complaint.

B. Plaintiff's New York Labor Law Retaliation Claim Must Be Dismissed

Plaintiff's New York Labor Law retaliation claim is premised on the nonsensical theory that "Saks' conduct in opposing Asante's unemployment benefits was retaliation for making said application in the first place." Lario Cert., Exhibit E, ¶ 91.

New York Labor Law Article 7, § 215 prohibits retaliation against any employee who complains that his employer has engaged in conduct reasonably believed to be in violation of "any provision of this chapter." That chapter of the Labor Law contains a variety of provisions, but contains no reference to unemployment benefits. Indeed, nowhere in Article 7 §§ 200-219 are unemployment benefits even mentioned.

New York Labor Law Article 18, Title 7 § 596, also referenced in the Amended Complaint, deals with the claim filing, registration, and reporting required by an individual seeking unemployment benefits. It has nothing to do with a claim for retaliation based on an employer responding to an application for unemployment benefits, nor does any other language in the Title 7 benefits provisions of the law.

Saks has the legal right -- and indeed the obligation -- to submit to the Division of Unemployment facts related to plaintiff's claim for unemployment benefits. Doing so does not constitute retaliation; rather, it constitutes compliance with a State agency's request for information.

Further, the Amended Complaint fails to assert that the Saks defendants took any adverse action against plaintiff for any of the impermissible reasons in any provision of that chapter of the law, a required element of a retaliation claim. To the contrary, plaintiff states that his unemployment benefits were "initially" withheld and denied (Lario Cert., Exhibit E, ¶ 92), which suggests that he was ultimately granted benefits. As a result, plaintiff has not pled any adverse action.

Simply stated, the Fifth Count of the Amended Complaint, alleging retaliation in violation of the New York Labor Law, utterly fails to state a cognizable claim and must be dismissed.

C. Plaintiff's Constructive Discharge Claim Must Be Dismissed

Plaintiff's Sixth Count, alleging constructive discharge, is predicated on his suspension without pay. Specifically, plaintiff claims that, "[by] continuing to indefinitely suspend Asante *without pay*,…Saks deliberately made Asante's working condition at Saks intolerable… [and] constructively discharged Asante from it employment as a salesperson". Lario Cert., Exhibit E, ¶¶ 95 98).

Constructive discharge occurs when an employer intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily. *Cadet v. Deutsche Bank Sec. Inc.*, 2013 WL 3090690, at *11 (S.D.N.Y. June 18, 2013). A work atmosphere is intolerable if it is "so difficult that a reasonable person in the employee's shoes would have felt compelled to resign." *Id.* To support a claim for constructive discharge, a plaintiff must allege and prove "misconduct [that] created an environment that is both objectively and subjectively hostile. He also must prove that the alleged hostile work environment was caused by animus towards the plaintiff "**as a result of [his] membership in a protected class**." *House v. Wackenhut Servs., Inc.*, 2012 WL 4017334, at *19 (S.D.N.Y. Aug. 20, 2012), quoting *Sullivan v. Newburgh Enlarged Sch. Dist. Clarence Cooper,* 281 F.Supp.2d 689, 704 (S.D.N.Y. 2003) (emphasis added). "The existence of a hostile work environment is a 'necessary predicate' to a constructive discharge case." *Day v. New York City Dep't of Consumer Affairs*, 2016 WL 1070843, at *8 (S.D.N.Y. Mar. 15, 2016) (quoting *Penn. State Police v. Suders*, 542 U.S. 129, 149 (2004)). When a complaint fails to adequately plead a hostile work environment claim, a constructive discharge claim must necessarily fail as well. *White v. New York State Dept of Corr. Servs. & Cmty. Supervision*, 2016 WL 1028009, at *1 (S.D.N.Y. Mar. 14, 2016), citing *Fincher v. Depository Trust & Clearing Corp.,* 604 F.3d 712, 725 (2d Cir. 2010).

Plaintiff's constructive discharge claim is based solely on the decision to place him on an unpaid suspension. There are no allegations of harassment by anyone at Saks. Plaintiff does not remotely allege a hostile work environment, intolerable conditions of any kind, or any conduct predicated on his race or any other legally protected characteristic.

The Sixth Count of the Amended Complaint, alleging constructive discharge, cannot survive dismissal.

II. Plaintiff's Claims Against The Saks Defendants Are Subject To Arbitration And Must Be Dismissed

Plaintiff's claims under § 1981 and the New York City Human Rights Law, as well as the New York Labor Law, breach of contract and constructive discharge claims, are subject to mandatory arbitration pursuant to the CBA.

A CBA's arbitration provision must be honored unless the statutes under which the claims arise preclude arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 U.S. 614, 628 (1985). Here, they do not. "It is well established that… § 1981, and… New York Human Rights and Labor Law claims, are susceptible to arbitration." *Lawrence v. Sol G. Atlas Realty Co.*, 2015 WL 5076957, at *3 (E.D.N.Y. Aug. 27, 2015); *see also Arciniaga v. General Motors Corp.,* 460 F.3d 231, 234 (2d Cir.2006) (discrimination claim asserted under 42 U.S .C. § 1981 is arbitrable); *Gonder v. Dollar Tree Stores, Inc.*, 2015 WL 6681214 (S.D.N.Y. Nov. 2, 2015) (granting defendant's motion to dismiss and compel arbitration of plaintiff's NYCHRL claims); *Gjoni v. Orsid Realty Corp.*, 2015 WL 4557037, at *3 (S.D.N.Y. July 22, 2015) ("there is no dispute that Plaintiff's federal and state labor law claims can be subjected to arbitration."); *Reynolds v. de Silva*, 2010 WL 743510 at *4 (S.D.N.Y. Feb. 24, 2010) (New York Labor Law claims are arbitrable).

Plaintiff's contract and constructive discharge claims clearly fall under, are governed by, and require interpretation of, the CBA because they rise and fall on whether plaintiff's suspension constituted a violation of the Management Rights clause. Inasmuch as these claims are substantially dependent on the meaning, significance, and review of the CBA, they are inextricably intertwined with the CBA and therefore preempted by federal labor law and subject to arbitration.

"The Supreme Court of the United States has long held that Section 301 gives federal courts jurisdiction over controversies involving collective bargaining agreements." *Zuckerman v. Volume Servs. Am., Inc.,* 304 F.Supp.2d 365, 368 (E.D.N.Y.2004) (citing *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 456 (1957)). Section 301(a) of the Labor Management Relations Act of 1947 provides that: "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce may be brought in any district court of the United States having jurisdiction of the parties…." 29 U.S.C. § 185(a). Section 301 "mandate[s] resort to federal rules of law in order to ensure uniform interpretation of collective-bargaining agreements, and thus to promote the peaceable consistent resolution of labor-management disputes." *Lingle v. Norge Division of Magic Chef, Inc*., 486 U.S. 399, 404 (1988). "Section 301 [preempts state-law] claims founded directly on rights created by collective bargaining agreements, and also claims 'substantially dependent upon an analysis of a collective bargaining agreement'." *Id*. at 410 (*quoting Electrical Workers v. Hechler*, 481 U.S. 851, 859, n. 3 (1989)). Any claim that challenges a provision in a CBA, must be brought under section 301. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210 (1985); *Vera v. Saks & Co.,* 335 F.3d 109, 116

(2d Cir. 2003) ("plaintiff's challenge to the lawfulness of a term of the CBA will require substantial interpretation of the CBA"). Importantly for the constructive discharge claim, the preemptive effect of Section 301 applies not only to questions that "arise in the context of a suit for breach of contract," but also to those "in a suit alleging liability in tort." *Id.* at 211.

When claims are preempted, courts have the discretion to direct the parties to arbitration. *Russo v. 201 Riverside Tenants, Inc.*, 2011 WL 166928, at *3 (S.D.N.Y. Jan. 19, 2011). Since the contract and tort claims in this case are preempted by Section 301, they should be dismissed and directed to arbitration.

When the claims are arbitrable, as they are here, the next step is consideration of the actual terms of the CBA to determine whether the parties intended to arbitrate the dispute. In this regard, an arbitration agreement that clearly and unmistakably requires the employee to arbitrate his claims must be enforced. *14 Penn Plaza v. Pyett*, 556 U.S. 247, 257-58 (2009); *Germosen v. ABM Industries Corp.*, 2014 WL 4211347, at *4 (S.D.N.Y. Aug. 26, 2014). The "clear and unmistakable" test can be met by a CBA that contains a broad provision agreeing to submit to arbitration all causes of action arising out of the employment relationship or a CBA that contains an explicit incorporation of the statutory requirements by identifying the statutes by name or citation. *See McLean v. Garage Mgmt. Corp.*, 2011WL 1143003, at *5 (S.D.N.Y. Mar. 29, 2011) (citing *Rogers v. New York Univ.*, 220 F.3d 73, 76 (2d Cir. 2000), abrogated on other grounds by *Pyett*, 556 U.S. at 274). *Pyett* does not allow courts to disregard arbitration agreements just because a plaintiff feels he has not been fairly treated by the union. *Id.* at *5.

Indeed, "federal policy strongly favors arbitration as an alternative dispute resolution process, thus, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, and federal policy requires courts to construe arbitration clauses as broadly as possible." *Merrick v. UnitedHealth Grp. Inc.*, 127 F. Supp. 3d 138, 146-47 (S.D.N.Y. 2015), quoting *Collins & Aikman Prods. Co. v. Building Sys., Inc.,* 58 F.3d 16, 19 (2d Cir.1995) (internal citations and quotations omitted); *see also, e.g., Champion Auto Sales, LLC v. Polaris Sales Inc.,* 943 F.Supp.2d 346, 351 (E.D.N.Y. 2013) ("In keeping with this policy, the Court resolves doubts in favor of arbitration and enforces privately-negotiated arbitration agreements in accordance with their terms.").

The CBA here expressly provides for arbitration of all disputes or complaints "arising between the parties, under or out of this Agreement or the interpretation, application, performance, or any alleged breach thereof, and shall be processed and disposed of [in accordance with the CBA]". Lario Cert., Exhibit H, Art. 21.

New York Courts have found similar arbitration clauses to be "broad" clauses that satisfy the clear and unmistakable requirement. *See Serebryakov v. Golden Touch Transp. of NY, Inc.*, 2015 WL 1359047, at *8 (E.D.N.Y. Mar. 24, 2015), collecting such cases, including *Paramedics Electromedicina Comercial. Ltda v. GE Med. Sys. Info. Techs., Inc.,* 369 F.3d 645, 649 (2d Cir. 2004) (clause requiring arbitration for "any controversy, claim or dispute between the Parties arising out of or relating in any way to this Agreement" was "of the broad type"); *Vera v. Saks & Co.,* 335 F.3d 109,117 (2d Cir. 2003) (language in collective bargaining agreement requiring arbitration of "[a]ny dispute, claim, grievance or difference arising out of or relating to this Agreement which the Union and the Employer have not been able to settle" constituted a broad arbitration clause); *ACE Capital Re Overseas Ltd. v. Central United Life Ins. Co.,* 307 F.3d 24, 27, 33–34 (2d Cir. 2002) (clause requiring arbitration "if any dispute shall arise between the parties hereto with reference to the interpretation of this Agreement or their rights with respect to any transaction involved" was broad); *Mehler v. Terminix Intern. Co. L.P.,* 205 F.3d 44, 49–50

(2d Cir. 2000) ("There is no dispute that the arbitration clause at issue is a classically broad one. The clause provides for arbitration of 'any controversy or claim between [the parties] arising out of or relating to' the Agreement." (Alteration in original). (Citing *Oldroyd,* 134 F.3d at 76)); *Smith/Enron Cogeneration Ltd. P'ship. Inc. v. Simth Cogeneration Int'l. Inc.,* 198 F.3d 88, 98–99 (2d Cir. 1999) (clause providing that "[a]ny dispute that is not resolved by the parties shall be finally settled by arbitration" was broad); *North. River Ins. Co. v. Allstate Ins. Co.,* 866 F.Supp. 123, 127 (S.D.N.Y. 1994) (clause requiring arbitration "[i]f *any* dispute shall arise between the [parties] with reference to the interpretation of this contract or their rights with respect to any transaction involved" was broad (emphasis and alteration in original)).

Based on this broad arbitration provision, all of plaintiff's claims against the Saks defendants must be arbitrated as described below.

A. First Count (Race Discrimination in the Making and Enforcement of a Contract)

In the First Count, plaintiff alleges that the Saks defendants "have discriminated against Asante on the basis of race **in the making and enforcement of a contract**". (Lario Cert., Exhibit E, at ¶60, emphasis added).[2] The language in this Count mirrors the text of 42 U.S.C. § 1981, which provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to **make and enforce contracts**...." 42 U.S.C. § 1981(a) (emphasis added). The Supreme Court has construed § 1981 as "prohibit[ing] racial discrimination in the making and enforcement of private contracts," *Patterson v. McLean Credit Union,* 491 U.S. 164, 171 (1989). Pursuant to the Civil Rights Act of 1991, "make and enforce contracts" is defined as "includ[ing] the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual

[2] Notably, this language was also included in the original Complaint. (Lario Cert., Exhibit A, ¶ 28).

relationship." *Marosan v. Trocaire Coll.*, 2015 WL 1461665, at *10 (W.D.N.Y. Feb. 5, 2015) quoting 42 U.S.C. § 1981(b).[3]

Importantly, plaintiff is not alleging disparate treatment or disparate impact, but discrimination "in the making and enforcement of a contract". The only contract at issue in this litigation is the CBA. Article 2 of the CBA provides, in part, that "nothing in this Agreement shall be deemed to limit the Employer in any way in the exercise of all the functions of management, including but not limited to, the right to hire, ***suspend***, discharge for just cause its salespeople". Lario Cert., Exhibit H, Art. 2 (emphasis supplied). The CBA also prohibits discrimination against any employee on account of Union activities, gender, sexual orientation, disability, **race**, age, color or creed or national origin, or other legally protected status. Lario Cert., Exhibit H, Art. 25 (emphasis supplied). The fact that this claim challenges whether plaintiff's suspension complied with the Management Rights provision of the CBA and whether Saks enforced that provision in a discriminatory manner places the terms and conditions of the CBA directly and substantially at issue.[4]

Where disparate treatment is alleged, as in *Pyett*, the court conducts the clear and unmistakable analysis to determine if the parties intended to arbitrate the claim. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 274 (2009). Here, however, because this cause of action is a clear CBA enforcement/breach of contract claim, the "clear and unmistakable" standard found in *Pyett* would not apply. Even if it did, it cannot be disputed that a claim alleging discriminatory enforcement of the Management Rights clause of the CBA would be encompassed by the arbitration provision. As a result, plaintiff's First Count must be dismissed and pursued in arbitration pursuant to the CBA.

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[3] To the extent plaintiff claims that this discrimination claim is also brought under the New York City Human Rights Law, the City law has no comparable provision to § 1981 for discrimination in the making and enforcing of contracts. As a result, plaintiff fails to state a claim under the New York City Human Rights Law.

[4] Similarly, plaintiff's "race discrimination" claim against the RWDSU Local 1102 in the Third Count is based on the Union's alleged failure to submit a grievance for his suspension in accordance with the CBA. (Amended Complaint ¶71-73). Plaintiff's race discrimination claims clearly turn on an interpretation of the meaning of the CBA.

B. Second Count (Breach of the CBA)

Plaintiff's second cause of action, breach of the CBA, falls squarely within the purview of the CBA's grievance procedure and must be pursued through arbitration. Plaintiff's breach of the CBA claim, which also goes to the substance of the other causes of action, asserts that plaintiff's "indefinite suspension without pay is arbitrary and without cause, and in breach of the CBA". Lario Cert., Exhibit E, ¶ 68. In short, plaintiff argues that the Saks defendants did not have the contractual right under the Management Rights clause to suspend him.

Plaintiff's breach of the CBA claim requires interpretation of the CBA in order to determine whether the Saks defendants were within their rights to suspend plaintiff without pay. As such, plaintiff's Second Count should be dismissed in favor of arbitration.

C. Fifth Count (New York Labor Law Retaliation)

As discussed at length above, this Count should be dismissed because it fails to state a cognizable legal claim. Should this Court disagree, the Fifth Count of the Amended Complaint, asserting that Saks opposed plaintiff's "unemployment benefits in retaliation for making said application in the first place" Lario Cert., Exhibit E, ¶ 91, should be directed to arbitration since the application for unemployment benefits is predicated on the alleged contractual breach that constituted plaintiff's suspension without pay.

D. Sixth Count (Constructive Discharge)

The Sixth Count should also be dismissed for failure to state a cognizable legal claim, but if it is not, should be directed to arbitration since it is predicated on the propriety of plaintiff's suspension without pay. Plaintiff claims "[by] continuing to indefinitely suspend Asante without pay…Saks deliberately made Asante's working condition at Saks intolerable… [and] constructively discharged Asante from it employment as a salesperson". Lario Cert., Exhibit E, ¶¶ 95 98. As with the Second Count discussed above, plaintiff here contends that Saks was not permitted to suspend plaintiff pursuant to the Management Rights provision of the CBA. A resolution of this claim inherently involves an analysis of the CBA. Therefore, plaintiff's Sixth Count should likewise be dismissed.

III. Plaintiff's Claims Are Also Barred For Failure To Exhaust Contractual Remedies In The CBA

Plaintiff's Amended Complaint should be dismissed in its entirety because he failed to first seek redress for his claims through the grievance and arbitration procedure mandated by the CBA. Plaintiff also filed suit knowing that his union, RWDSU Local 1102, had initiated the grievance process and that its demand for arbitration was in process. Lario Cert., Exhibit E, ¶¶ 24, 41.

It is well-settled that union members asserting claims covered by a CBA's grievance and arbitration clause cannot sue their employers in court without first exhausting the administrative complaint resolution procedures agreed upon between the employer and the employees' union. *See Moore v. Verizon*, 2016 WL 825001, at *5 (S.D.N.Y. Feb. 5, 2016), quoting *Vera v. Saks & Co.,* 335 F.3d 109, 118 (2d Cir.2003) (An employee is "required to attempt to exhaust any grievance or arbitration remedies provided in [his or her] collective bargaining agreement" before bringing suit in federal court.). "Federal labor policy generally requires that Plaintiffs utilize CBA grievance procedures before bringing a suit in court." *Fagundes v. Lane*, 2014 WL 1276373, at *8 (E.D.N.Y. Mar. 27, 2014); *see also Republic Steel Corp. v. Maddox,* 379 U.S. 650, 652, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965); *Campbell v. Kane, Kessler, P.C.,* 144 F. App'x 127, 130 (2d Cir.2005). Indeed, "[i]f employees could file suit in federal court without exhausting the remedies established in their collective bargaining agreement, there would be little incentive to pursue those remedies." *Fraternal Order of Police Nat'l Labor Council. USPS No. 2 v. United States Postal Serv.*, 988 F. Supp. 701, 709 (S.D.N.Y. 1997). *See also Harding v. City of New York,* 724 F. Supp. 1129 (S.D.N.Y. 1989) (employees, whose claims for earned wages derived from employment contract between union and city, had to first pursue their remedies under their collective bargaining agreement before pursuing a judicial remedy); *see also Vaca v. Sipes,* 386 U.S. 171, 184 (1967) ([T]he employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement.).

Further, the employee's obligation to arbitrate exists whether or not the union pursues arbitration, even if an employee believes the union has unfairly declined to do so. *See Bouras v. Good Hope Mgmt. Corp.*, 2012 WL 3055864, at *4 (S.D.N.Y. July 24, 2012); *Gildea v. BLDG. Management,* 10 Civ. 3347 (DAB), 2011 WL 4343464, at *3 (S.D.N.Y. April 16, 2011). "Arbitration is a favored method of dispute resolution in New York … The announced policy of this State favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties." *Ferrarella v. Godt*, 15 N.Y.S.3d 180, 183 (N.Y. App. Div.), *leave to appeal denied,* 26 N.Y.3d 913, 44 N.E.3d 937 (2015).

Here, the grievance and arbitration procedures contained in the CBA specifically provide: "The parties shall make earnest efforts to adjust any complaints, grievances or disputes arising under this Agreement or any breach thereof, before the dispute **shall** be referred for arbitration."

Lario Cert., Exhibit H, Art. 21B (emphasis supplied). The CBA defines a grievance as "a dispute or complaint arising between the parties hereto under or out of this Agreement or the interpretation, application, performance, or any alleged breach thereof". *Id.* The grievance procedure can be initiated by the Employee, Shop Steward or a Union Representative. *Id.* at Art. 21B(1). There is a three step grievance process and unresolved grievances must be submitted to arbitration. *Id.* at 21B, 21C.

Here, plaintiff admittedly did not initiate the grievance process and did not demand arbitration. His failure to do so precludes him from bringing this action. *See Harding v. City of New York,* 724 F. Supp. 1129 (S.D.N.Y. 1989) (employees had to first pursue their remedies under their collective bargaining agreement before pursuing a judicial remedy).

In his Amended Complaint, plaintiff claims he contacted RWDSU Local 1102 Union and requested that it file a grievance on his behalf. Lario Cert., Exhibit E, ¶ 17. Plaintiff subsequently learned that RWDSU Local 1102 did in fact initiate a grievance and demand arbitration on his behalf. *Id.* at ¶¶ 24, 41. Plaintiff nevertheless ignored those procedures and filed this lawsuit. Even though plaintiff contends that RWDSU Local 1102 failed to timely or adequately prosecute his grievance and arbitration, this does not relieve him of his obligation to exhaust his contract remedies before filing suit. *See Bouras v. Good Hope Mgmt. Corp.*, 2012 WL 3055864, at *4 (S.D.N.Y. July 24, 2012); *Gildea v. BLDG. Management,* 2011 WL 4343464, at *3 (S.D.N.Y. April 16, 2011).

As such, plaintiff's Amended Complaint should be dismissed and plaintiff compelled to pursue his claims through arbitration.

IV. The Saks Defendants Did Not Waive The Right To Arbitrate Plaintiff's Claims

Plaintiff's only argument in opposition to the Saks defendants' pre-motion request for leave to file a motion to dismiss was that the Saks defendants' waived their right to compel arbitration. Importantly, plaintiff did not contest the arbitrability of his claims. Nor did he make any *Pyett* argument.

A waiver of arbitration determination is highly fact specific and no bright-line rule is applied, but three factors are considered: "(1) the time elapsed from when the litigation was commenced until the request for arbitration; (2) the amount of litigation to date, including motion practice and discovery; and (3) proof of prejudice." *Gonder v. Dollar Tree Stores, Inc.*, 2015 WL 6681214, at *2 (S.D.N.Y. Nov. 2, 2015), quoting *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc.*, 252 F.3d 218, 224 (2d Cir. 2001). "Waiver is not to be lightly inferred." *Del Turco v. Speedwell Design*, 623 F. Supp. 2d 319, 341-42 (E.D.N.Y. 2009), quoting *S & R Co. of Kingston v. Latona Trucking, Inc.,* 159 F.3d 80, 83 (2d Cir. 1998). "Although an extensive amount of delay between the commencement of an action and request for arbitration may suggest waiver, delay in seeking arbitration does not create a waiver unless it prejudices the opposing party.

Similarly, the amount of litigation that occurs before an arbitration request will result in waiver only when the substance of that litigation prejudices the opposing party. Merely answering on the merits, appearing at hearings, and participating in discovery, without more, will not necessarily constitute a waiver. In contrast, engaging in protracted litigation that prejudices the opposing party will result in a waiver of the right to arbitration. *Gonder v. Dollar Tree Stores, Inc.*, 2015 WL 6681214, at *2 (S.D.N.Y. Nov. 2, 2015).

Here, plaintiff filed a substantially new Amended Complaint on April 4, 2016. The new factual allegations and the new claim against the Saks defendants weighs heavily against plaintiff's waiver argument.

In addition, plaintiff acknowledged shortly before the Saks defendants sought leave to file this motion that "no discovery has yet been done except for the limited discovery required by the Discovery Protocols in the Southern District." Lario Cert., Exhibit C. RWDSU Local 1102 also agreed with plaintiff's assessment and similarly stated: "As Plaintiff notes, there has yet to be any discovery in this case except for the exchange of documents pursuant to the SDNY's initial discovery protocols in employment discrimination cases." Lario Cert., Exhibit D. Indeed, the only discovery that has occurred is the exchange of written discovery responses. No depositions have been scheduled or taken. Moreover, there are many newly pleaded allegations. As a result, the parties have not engaged in the kind of "protracted litigation" required for a waiver of the right to arbitration.

As for prejudice, there is none. In *Gonder*, this Court found no prejudice when "[n]o costly discovery has taken place. No extensive briefing ha[d] been undertaken by the parties. [Plaintiff] ha[d] not been required to participate in lengthy litigation, and [Defendant] [wa]s not attempting to utilize the Agreement to escape an adverse substantive finding by this Court". *Gonder v. Dollar Tree Stores, Inc.*, 2015 WL 6681214, at *4 (S.D.N.Y. Nov. 2, 2015). As in *Gonder*, the parties here have spent little to no time or money in discovery, have not undertaken extensive briefing and have not participated in depositions or lengthy litigation. Therefore, no prejudice would result from compelling arbitration in this matter.

For all these reasons, there has been no waiver of the right to arbitrate.

V. Claims That Are Not Dismissed Or Sent To Arbitration, If Any, Should Be Stayed Pending Arbitration

When a "case involves issues that are arbitrable pursuant to a written agreement, the Federal Arbitration Act requires that the Court stay the proceedings pending arbitration." *Germosen v. ABM Indus. Corp.*, 2014 WL 4211347, at *7 (S.D.N.Y. Aug. 26, 2014), *citing* 9

U.S.C. § 3. Moreover, "if the court concludes that some, but not all, of the claims in the case are arbitrable, it must then decide whether to stay the balance of the proceedings pending arbitration." *Victorio v. Sammy's Fishbox Realty Co., LLC*, 2015 WL 2152703, at *19 (S.D.N.Y. May 6, 2015), quoting *Oldroyd v. Elmira Sav. Bank, FSB,* 134 F.3d 72, 75–76 (2d Cir.1998).

This lawsuit involves issues that are arbitrable pursuant to a CBA. As such, any claims not dismissed and not subject to arbitration should be stayed pending the arbitration.[5]

CONCLUSION

For the foregoing reasons, the Saks defendants respectfully request that the Amended Complaint be dismissed as against them in its entirety.

Dated: Florham Park, New Jersey
June 9, 2016

Respectfully submitted,

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[5] Because the CBA does not allow an arbitrator to award punitive damages, if plaintiff is successful in arbitrating his discrimination and/or constructive discharge claims, where punitive damages are permitted, then the parties would submit that damage element to the Court for determination.